Supreme Court, U.S.
FILED
AUG 26 1998
OFFICE OF THE CLERK

(2)

No. 98-192

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LARRY CHANDLER and JOANNE CHANDLER,
Petitioners,

vs.

NORWEST BANK MINNESOTA, NATIONAL ASSOCIATION and CUSTOM MORTGAGE, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT CUSTOM MORTGAGE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWIN D. AKERS, JR.
Counsel of Record
ROBERT W. SCHMIEDER II
GALLOP, JOHNSON & NEUMAN, L.C.
101 South Hanley, Suite 1600
St. Louis, Missouri 63105
(314) 862-1200
(314) 862-1219 (Facsimile)

Attorneys for Respondent Custom Mortgage, Inc.

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

13 pp

RESPONSE TO PETITIONERS' QUESTIONS PRESENTED

The second Question Presented by Petitioners does not accurately reflect the issue in this case. The appropriate inquiry in this case is whether, under the Real Estate Settlement Procedures Act, 12 U.S.C. §§2601 *et seq.*, "table funding," which requires a contemporaneous assignment of a mortgage loan along with an advance of the loan funds by the assignee on or before the closing date, occurs where the assignee does not advance loan funds but purchases the mortgage loan on the secondary market approximately five days after the closing date.

TABLE OF CONTENTS

	Page
RESPONSE TO PETITIONERS' QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
ADDITIONAL REGULATION INVOLVED	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING WRIT	3
I. THE CHANDLERS HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI	3
II. THE UNDISPUTED FACTS ESTABLISHED THAT CUSTOM MORTGAGE, INC. DID NOT VIOLATE RESPA.	4
CONCLUSION	8

TABLE OF AUTHORITIES

Page(s)

CASES

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1954) 3

STATUTES AND REGULATIONS

12 U.S.C. §§2601 *et seq.* 3

12 U.S.C. §2602(3) 5

12 U.S.C. §2607 4

12 U.S.C. §2607(a), (b) 4

24 C.F.R. §§ 3500 *et seq* 7

24 C.F.R. §3500.2 6

24 C.F.R. §3500.2(b) 5

24 C.F.R. §3500.5(b)(7) 7

RULES

Sup. Ct. R. 10 3

Sup. Ct. R. 10(a),(b) 3

Sup. Ct. R. 10(c) 3

ADDITIONAL REGULATION INVOLVED

24 C.F.R. §§3500 *et seq.*, Appendix B (Regulation X)

The following illustrations provide additional guidance on the meaning and coverage of the provisions of RESPA. . . .

. . . .

5. *Facts*: A, a "mortgage originator," receives loan applications, funds the loan with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.

Comments: Compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction, rather than a referral fee, and is beyond the scope of Section 8 of RESPA. For purposes of Section 8, in determining whether a *bona fide* transfer of the loan obligation has taken place, HUD examines the real source of funding, and the real interest of the named settlement lender.

STATEMENT OF THE CASE

In December of 1995, the Chandlers contacted Custom Mortgage, Inc. ("Custom") to refinance their home mortgage. The Chandlers sought to borrow the net amount of $57,156.25 in order to refinance the principal amount of their home loan, to pay additional unsecured indebtedness, and to obtain cash for automobile and investment purposes. The Chandlers disclosed, and Custom confirmed, that they had previously filed a Chapter 7 bankruptcy proceeding on or about December 23, 1994 in the United States District Court for the Eastern District of Missouri. On or about April 6, 1995, the District Court granted the Chandlers a discharge.

On January 22, 1996, the Chandlers signed a promissory note with Custom. The principal amount of the note was $60,175.00. The note names Custom as the lender and payee. Custom charged the Chandlers a loan origination fee of two percent (2%) of the loan amount or $1207.50. Custom also charged the Chandlers a loan discount fee of three percent (3%) of the loan amount or $1811.25. Accordingly, the Chandlers were to receive $57,156.75. Under the loan agreement, the Chandlers had the "legal right under federal law to cancel this transaction, without costs, within THREE BUSINESS DAYS . . . ." The Chandlers acknowledged notice of such rights at that time. Furthermore, Custom notified the Chandlers that it was assigning, selling, or transferring its servicing rights to Norwest, as trustee.

By January 26, 1996, the Chandlers had not exercised their right to rescind the loan and acknowledged that three (3) business days had elapsed. The loan closed on that very day. To fulfill its obligations, Custom drew against its line of credit from its warehouse account at CoreStates Bank, N.A. ("CoreStates") for the cash to fund the loan amount less Custom's earned fees and charges. In other words, Custom borrowed $57,156.25

directly from CoreStates and Custom was solely liable for its repayment. Custom subsequently repaid CoreStates the borrowed commercial loan credit of $57,156.25, plus interest. Once CoreStates credited Custom's warehouse account with $57,156.25, Custom then arranged to wire those funds to Enterprise Bank in St. Louis, Missouri to close the Chandlers' loan on January 26, 1996.

On or about January 31, 1996, Equicon purchased the Chandlers' loan from Custom. Equicon paid Custom $64,316.68 for all of Custom's right, title, and interest in the Chandlers' loan.

REASONS FOR DENYING WRIT

I. THE CHANDLERS HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. The Chandlers have utterly failed to demonstrate that this case merits the exercise of this Court's discretion. Additionally, "[a] petition for a writ of certiorari will be granted only for compelling reasons." *Id.* The Chandlers cannot articulate a single "compelling reason" for this Court to review this case.

This case is a matter of first impression. Before the underlying judgments, no court had addressed the perimeters of table-funding under the Real Estate Settlement Procedures Act, 12 U.S.C. §§2601 *et seq.* ("RESPA"). Consequently, the Eighth Circuit's decision does not conflict with the decision of *any* court, let alone another United States court of appeals. *See* Sup. Ct. R. 10(a),(b).

The Chandlers imply that this case involves "an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). Yet, the Chandlers argue that both the circuit court and district court made erroneous factual findings and misapplied the law. This Court explicitly refrains from addressing cases involving erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Moreover, this Court does not grant certiorari merely to satisfy a scholarly interest or for the benefit of particular litigants. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1954).

This case presents no issue involving a split of authority in the circuit courts of appeals. This case presents no Eighth Circuit decision that conflicts with previous decisions of this Court. Finally, this case poses no important question of federal law that

should be decided by this Court. For these reasons, the Petition for Writ of Certiorari should be denied.

II. THE UNDISPUTED FACTS ESTABLISHED THAT CUSTOM MORTGAGE, INC. DID NOT VIOLATE RESPA.

RESPA forbids kickbacks or referrals and prohibits splitting charges for the rendering of a real estate settlement service other than for services actually performed. 12 U.S.C. §2607. Specifically, RESPA prohibits the following:

> (a) **Business referrals.** No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) **Splitting charges.** No person shall give and no person shall accept any portion, split, or percentage of any charges made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. §2607(a), (b). The Chandlers cannot demonstrate that Custom transgressed RESPA.

First, no evidence exists that Custom either gave or accepted any "thing of value" for the referral of business. The undisputed facts prove that Custom did not give any fee, kickback, or thing of value to anyone regarding the Chandlers' loan. The undisputed facts also prove that the only "thing of value" that Custom received at all regarding the Chandlers' loan was the purchase price from Equicon after the closing. Equicon purchased the

Chandlers' loan from Custom for $64,316.68. Custom received it for selling its right, title, and interest in the Chandlers' loan to Equicon, not for the referral of business.

Second, no evidence exists that Custom split charges for services that Custom did not perform. The Chandlers paid Custom $3,018.75 in loan origination and loan discount fees. Custom not only performed such services, but also did not give anyone a portion, split, or percentage of those charges. After closing the Chandlers' loan, Custom then sold the Chandlers' loan to Equicon for $64,316.68. Foremost, the sale of the Chandlers' loan to Equicon was not a real estate settlement service[1] because the sale occurred **after** closing. As a result, RESPA does not govern the transaction among Custom, Equicon, and Norwest, as trustee. Regardless, Custom did not split its profit from the sale of the Chandlers' loan with anyone. Again, the Chandlers offered no evidence whatsoever that Custom violated RESPA.

RESPA requires at least two persons to establish a violation of its proscriptions. To bring their loan transaction within the scope of RESPA, the Chandlers alleged that their loan was table-funded.

---

[1] Settlement service includes any services provided in connection with a real estate settlement including, but not limited to:

> title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans) and the handling of the processing, and closing of settlement.

12 U.S.C. §2602(3). *See also* 24 C.F.R. §3500.2(b).

> *Table funding* means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.

24 C.F.R. §3500.2. Therefore, the Chandlers had to establish that two things occurred **contemporaneously** at their closing on January 26, 1996. First, the Chandlers had to prove that there was an advance of loan funds from Norwest to Custom. Second, the Chandlers had to prove that there was an assignment of the loan from Custom to Norwest. Failure to establish either one of these two elements means that the Chandlers' loan was not table-funded and, consequently, not within the scope of RESPA.

The undisputed facts establish that only Custom advanced the loan funds to the Chandlers. On January 26, 1996, Custom funded the Chandlers' loan through its commercial line of credit from its warehouse account with CoreStates. Neither Norwest nor any other entity advanced moneys used to fund the Chandlers' loan on January 26, 1996, the closing date. The Chandlers' loan was not table-funded.

Having failed to bring their loan transaction within the definition of table-funding and, thus, RESPA, the Chandlers merely request a gratuitous expansion of RESPA's prohibitions. The Chandlers argue that a prior agreement among Custom, Equicon, and Norwest, as trustee (i.e. the Purchase and Sale Agreement), which constitutes a course of dealing among the parties regarding pricing and procedures for the purchase of secondary market loans, falls within the auspices of table-funding and, consequently, RESPA. The Chandlers contend that "[t]he Eighth Circuit's opinion now permits lenders to table fund loans and *still evade RESPA* by merely waiting a few days to get paid . . . ." (Pet. Brief p. 14.) Of course, table-funding requires a **contemporaneous** advance of funds along with an assignment of the loan to the person advancing funds. 24 C.F.R. §3500.2.

The fact that a lender "waits a few days" establishes that the payment and assignment were not contemporaneous. Therefore, the Chandlers' loan was not table-funded.

Not only is the Chandlers' loan transaction outside the grasp of RESPA, but it is explicitly exempt from RESPA. Secondary market transactions are exempt from RESPA. 24 C.F.R. §3500.5(b)(7). Custom originated the Chandlers' loan, closed the Chandlers' loan in its own name, and then sold the Chandlers' loan to Equicon on the secondary market, five (5) days after the closing date. In fact, the Chandlers' loan transaction precisely parallels HUD's illustration of a secondary market transaction.

> *Facts*: A, a "mortgage originator," receives loan applications, funds the loan with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.
>
> *Comments*: Compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction, rather than a referral fee, and is beyond the scope of Section 8 of RESPA. For purposes of Section 8, in determining whether a *bona fide* transfer of the loan obligation has taken place, HUD examines the real source of funding, and the real interest of the named settlement lender.

24 C.F.R. §§ 3500 *et seq.*, Appendix B, Example #5 . Here, Custom funded the Chandlers' loan with its wholesale line of credit from CoreStates, for which Custom was solely liable, on January 26, 1996. Equicon subsequently purchased the Chandlers' loan on January 31, 1996 for $64,316.68. Equicon's payment to Custom was not an advance of loan funds used to

fund the Chandlers' loan accompanied by a contemporaneous assignment of the loan to Equicon. The payment occurred five (5) days after Custom disbursed its own funds to the Chandlers. Instead, Equicon's payment was the purchase price for the value of the Chandlers' mortgage loan and servicing rights on the secondary market. It was payment for the transfer of Custom's vested interests in the Chandlers' loan on the secondary market. Not only was the Chandlers' loan not table-funded, but it was exempt from the proscriptions of RESPA because the sale to Equicon was a secondary market transaction.

CONCLUSION

For each of the reasons set forth above, this Court should deny the Chandlers' Petition for Writ of Certiorari.

Respectfully submitted,

EDWIN D. AKERS, JR.
Counsel of Record
ROBERT W. SCHMIEDER II
GALLOP, JOHNSON & NEUMAN, L.C.
101 South Hanley, Suite 1600
St. Louis, Missouri 63105
(314) 862-1200
(314) 862-1219 (Facsimile)

Attorneys for Respondent
Custom Mortgage, Inc.